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No. 84-883

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

EVA KOLLSMAN, CITY NATIONAL BANK,
Petitioners,

vs.

CITY OF LOS ANGELES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is it necessary for this Court to review a determination by the Court of Appeals for the Ninth Circuit that abstention is appropriate where a state law question concerning whether a land subdivision is approved by operation of law was found to be uncertain, where the dissenting opinion in the Court of Appeals and the memorandum decision of the District Court reached directly contrary conclusions with respect to the proper interpretation of the state statutes at issue, and where the resolution of the state law question could moot or present the federal constitutional questions in a different posture?

2. Whether the delay in deciding the federal constitutional questions should be considered in determining whether abstention is appropriate, where the federal questions would have been resolved by the District Court but for petitioners' post-trial request to reopen the case to present their state law question, where petitioners subsequently did not oppose entry of a final judgment on only the state law question by the District Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and where the dissenting opinion in the Court of Appeals upon which petitioners rely for their argument that abstention is inappropriate concludes that

petitioners' state law theory is clearly erroneous?

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Respondent City of Los Angeles respectfully opposes the Petition for Writ of Certiorari ("Petition") filed herein.

STATEMENT OF THE CASE

This is a land use case wherein petitioners seek to avoid the application of the "slope density formula" of the general plan of the City of Los Angeles ("City") to their proposed hillside subdivision located in the Santa Monica Mountains. Under the slope density formula the allowable density decreases from a maximum of one unit per acre to a minimum of one unit per 20 acres as the slope of the land and the corresponding impacts of development increase. Petitioners own 120 acres and seek to develop 70 lots on 85 acres. Petitioners' proposed 70-lot subdivision project would require the

grading of over two million cubic yards of earth and would cut up to 36 feet from the tops of natural hills. RT (1979) at 368-371. Because of the extreme steepness of petitioners' land (82% of the land has a slope of 35% or more; RT (1979) at 754), the slope density formula would permit a subdivision of no more than 9 lots on the 85 acres.

Petitioners filed a six-count complaint on March 1, 1977. CR 1. Counts I and III sought to invalidate the slope density formula of the general plan on constitutional theories of inverse condemnation and equal protection, respectively. Count II sought damages of $6.3 million on an inverse condemnation

theory. Counts IV, V and VI were various state law theories which were dismissed before trial upon motions by the City. CR 8 and 87. On March 15, 1978, the City filed a petition for writ of mandamus in the United States Court of Appeals for the Ninth Circuit arguing the complaint was not ripe for adjudication and that the District Court was required to abstain. On June 7, 1978, the Court of Appeals denied the City's petition for writ of mandamus. A seven-day court trial of Counts I, II and III was held in March and April, 1979.

On March 21, 1980 petitioners filed a "Motion to Reopen to Submit Additional Evidence" which raised for the first time an argument that the

subdivision application had been "deemed approved" pursuant to California statutes. CR 153. On March 28, 1980, the City filed opposition to the motion to reopen. CR 155. On March 5, 1981, the District Court ordered a further hearing. CR 162. Two additional days of trial were held in April, 1981 where, inter alia, the City presented testimony and evidence regarding the City's administrative processing of petitioners' subdivision application. RT (1981) at 152-263.

On November 30, 1981, the District Court issued a minute order stating, without further explanation: "On the issue of liability the court finds for the plaintiff and against the

defendant" and directing counsel to confer and to submit to the court a draft of proposed findings of fact and conclusions of law. CR 172; see also CR 173. On February 22, 1982, over the City's opposition (CR 180), the District Court granted petitioners' motion to amend the complaint to conform to proof by adding Counts VII and VIII (CR 184), after the District Court had suggested such motion be filed (Petition, App. at C-4). Count VII is the "deemed approved" claim. Count VIII is a 42 U.S.C. Section 1983 claim which "has not been litigated." Ibid. On February 2, 1983, the District Court issued its memorandum decision finding petitioners' proposed subdivision to

be approved by operation of state law. Petition, App. C. Judgment was entered as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Petition, App. D.

On July 17, 1984 the Court of Appeals for the Ninth Circuit issued an opinion vacating the decision of the District Court. Petition, App. A. On September 5, 1984 the Court of Appeals denied a petition for rehearing and rejected the suggestion for a rehearing en banc, with no judge of the full court requesting a vote on the suggestion for rehearing en banc. Petition, App. B.

SUMMARY OF ARGUMENT

Abstention is appropriate in this case because there is an uncertain question of state law whose resolution might moot, or present in a different posture, the federal constitutional questions presented. The abstention doctrine followed by the Ninth Circuit Court of Appeals is consistent with the opinions of both this Court and the other circuits of the Court of Appeals.

Although petitioners contend the question of state law presented is certain, they fail to identify whether they agree with the District Court's interpretation of the state statutes or that of the dissenting judge in the

Court of Appeals, who found the District Court's analysis to be "clearly erroneous." Plainly, if petitioners cannot bring themselves to identify to this Court which of two mutually inconsistent resolutions of the state law question they find to be correct, or to explain why the other resolution is so clearly erroneous it may be safely disregarded as creating no uncertainty, they cannot seriously complain that the Court of Appeals majority was unable to resolve this conflict and instead found the state law question to be uncertain.

Petitioners' complaint regarding the "delay" abstention may cause if they now pursue their state law claim in state court should be disregarded.

It was petitioners' own litigaton strategy, by which petitioners reopened the case in 1980 to raise their state law claim after trial of the federal constitutional issues had been conducted in 1979, which has resulted in a delay in resolution of the federal constitutional issues to date.

ARGUMENT

I.

IT WAS PROPER FOR THE COURT OF APPEALS TO DIRECT ABSTENTION WHEN IT FOUND THE QUESTION OF STATE LAW TO BE UNCERTAIN

Railroad Commission v. Pullman Co., 312 U.S. 496 (1941) articulated

standards for abstention in cases where the federal constitutional issues presented could be affected by the resolution of unsettled questions of state law.[1/] As stated in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976), citing County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959):

> "Abstention is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of state law.'"

1/ Counts I and III of the complaint will be moot if the subdivision herein is "deemed approved" and Count II will at least be presented in a different posture.

In Pennhurst State School & Hospital v. Halderman, 465 U.S. ___, 79 L.Ed.2d 67, 92-93 (1984), this Court recently stated:

> "Under the abstention doctrine, unclear issues of state law commonly are split off and referred to the state court."

The grounds for Pullman abstention were most recently reviewed in Hawaii Housing Authority v. Midkiff, 467 U.S. ___, 81 L.Ed.2d 186, 194 (1984):

> "In Railroad Comm'n v. Pullman Co., supra, this Court held that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal

> questions and 'needless friction with state policies . . . .'"

In Hawaii Housing Authority v. Midkiff, while reversing on other grounds, this Court upheld the determination of the Court of Appeals for the Ninth Circuit that abstention was not appropriate because there was no uncertain question of state law presented. In the present case the Court of Appeals for the Ninth Circuit has found the issues of state law are uncertain and that abstention is therefore appropriate. The dissenting judge in the Court of Appeals would reverse the District Court on the merits, finding the District Court's interpretation of state law to be clearly wrong.

The City believes that the interpretation of state law by the dissenting judge in the Court of Appeals is correct. However, the majority panel of the Courts of Appeals, which cogently and correctly identified the complex state law issues presented, found their resolution to be uncertain. That conclusion should not now be disturbed. Certainly the determination of whether or not state issues are too uncertain to be properly decided is a question uniquely within the judgment of the Court of Appeals panel which examined in detail the specific state law questions at issue. Sound principles of judicial economy necessitate a

degree of deference to that determination. The Court of Appeals for the Ninth Circuit recognized this when no judge of the full court requested a vote on the suggestion for rehearing en banc. None of the considerations governing review on certiorari of Rule 17 of the Rules of the Supreme Court suggest it is appropriate to request that this Court now review the various California statutes at issue to determine whether it finds their interpretation to be certain or uncertain.

Contrary to petitioners' claim, the Court of Appeals for the Ninth Circuit does not interpret the abstention doctrine in a manner at variance with other circuits of the

Court of Appeals. A number of the circuits have suggested abstention would be appropriate in land use contexts. See, e.g., Caleb Stowe Associates Ltd. v. County of Albemarle, 724 F.2d 1079, 1080 (4th Cir. 1984) following Fralin & Waldron, Inc. v. City of Martinsville, 493 F.2d 481 (4th Cir. 1974); Nasser v. City of Homewood, 671 F.2d 432, 440 n. 7 (11th Cir. 1982) citing with approval Hill v. City of El Paso, 437 F.2d 352 (5th Cir. 1971); Heritage Farms, Inc. v. Solebury Township, 671 F.2d 743, 747 (3d cir. 1982), cert. denied 456 U.S. 990, citing with approval Hill v. City of El Paso, supra.

In each of the cases cited by petitioners for the proposition that

the Court of Appeals for the Ninth Cirucit is out of step with other abstention decisions (Petition at page 14, last paragraph) the court found no uncertain question of state law to be present. The Court of Appeals for the Ninth Circuit similarly rejects abstention in land use cases where no uncertain state law issues are found. See Cinema Arts, Inc. v. County of Clark, 722 F.2d 579 (9th Cir. 1983); Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), reversed on other grounds in Hawaii Housing Authority v. Midkiff, supra. None of the cases cited by petitioners indicated abstention would not be appropriate in a land use case if an uncertain question of state law which

might moot or present federal constitutional issues in a different posture had, in fact, been found.

II.

THE PETITION FAILS TO EXPLAIN HOW THE STATE LAW QUESTIONS CAN BE RESOLVED WITH CERTAINTY

The Petition is notable in that its argument fails to contain a section contending the state law issues presented herein are not uncertain. The bald assertion that "the state law is clear" is made (Petition at 15) without amplification. Petitioners rely upon the District Court's findings (Petition at 3, note 3), and upon

Judge Reinhardt's rejection of abstention. Nowhere do petitioners state which judge's interpretation of the state law issues they find to be correct and certain. The two opinions cannot be reconciled. Judge Reinhardt stated the following concerning the District Court's findings:

> "The district court, intentionally or otherwise, circumvented the provisions of California law by finding as a matter of fact that the City had accepted Kollsman's application as complete. Because its critical finding of fact is so clearly erroneous, the district court's decision cannot stand. It is obvious from the record before us that the City did the precise opposite of that which the district court says it did. The City <u>expressly</u> found that the application was incomplete, not complete. Moreover, even

> if, under California law, Kollsman's application could have been deemed complete, that event would not have occured until several days late on November 26, 1978. Even in that case, the City could not be deemed to have approved the application, for the City subsequently explicitly disapproved the application in a timely manner. Thus, contrary to the district court's assertion, it is absolutely clear that the city never approved the application, explicitly or by operation of law." Petition, App. at A-17.

If petitioners contend that the District Court's resolution of the state law question is correct[2/], they must then explain why Judge Reinhardt's directly contrary conclusion does not create exactly the uncertainty regarding the correct

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2/ Please see note 4, infra.

resolution of the state law questions which led the majority of the Court of Appeals to direct abstention herein. Alternatively, if Judge Reinhardt is correct and petitioners' state law theory is "clearly erroneous," then any "delay" occasioned by petitioners' choice to continue pursuit of this groundless claim in the state courts should not be of concern to this Court.

It is apparant that petitioners faced a logical dilemma they were unable to resolve in drafting their Petition. If they are to successfully contend the state law question is certain they must both demonstrate that either the District Court's opinion or Judge Reinhardt's opinion is correct and then also demonstrate

how the other opinion is so incorrect it may be entirely disregarded as creating no uncertainty as to the resolution of the state law question.

Instead of identifying which opinion correctly resolved the state law question, petitioners attack a strawman by claiming the Court of Appeals found uncertainty only because the City disagreed with the District Court's interpretation. Plainly, however, the Court of Appeals itself carefully reviewed the complex questions of interpretation of the interrelated provisions of the "deemed approved" statute, the California Subdivision Map Act, and the California Environmental Quality Act. See Petition, App. at A-7 to A-14.

While the Court of Appeals found the District Court's reasoning was "somewhat opaque" (Petition, App. at A-10, n. 12) it was reluctant to find, as did the dissent, that the District Court's reasoning was "clearly erroneous" (Petition, App. at A-17).

III.

IT IS PETITIONERS' OWN LITIGATION STRATEGY WHICH HAS RESULTED IN THE DELAY IN REACHING JUDGMENT ON THE CONSTITUTIONAL ISSUES OF WHICH PETITIONERS' NOW COMPLAIN

In the 1979 trial of the constitutional "inverse condemnation" claims petitioners contended that,

because they would not realize a profit from development of the nine unit subdivision permitted by the City's general plan, their property had been "taken" without just compensation. Petitioners' appraiser testified that a nine-lot subdivision would have cost somewhat over three million dollars to develop in 1977. RT (1979) at 201. He testified that such lots could be sold at $350,000 each (Ibid.) resulting in total projected sales revenues of $3,150,000. (Hence his "no value" opinion cited in the Petition at 4.) However, the petitioners' appraiser, the City's appraiser, and Mr. Kollsman all agreed at trial that property values in the area literally doubled

between 1977 and 1979 (RT (1979) at 154, 763 and 888), so that sales revenues would have been considerably higher by the time lots were actually developed and ready for sale, had development begun in 1977.

Moreover, petitioners' appraiser also testified that the access road for the nine-unit subdivision would also greatly improve access to the existing villa on the land petitioners would retain. RT (1979) at 160. That improved access was valued at $500,000 in petitioners' offer of proof. RT (1979) at 164-168.

Thus, according to petitioners' own erroneous legal theory of inverse condemnation and their own evidence in the 1979 trial they would have

achieved a handsome net gain had they proceeded to develop their property in conformance with the City's land use regulations.[3/]

It is against this background that on March 21, 1980 petitioners filed a post-trial "Motion to Reopen to Submit Additional Evidence" which inter alia, raised for the first time the claim that their proposed 70 lot subdivision

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3/ Petitioners' "taking" theory is erroneous because the proper test is not whether a profit can be made on 85 acres, but whether the entire 120 acre property retains substantial value as regulated. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). The City presented uncontroverted testimony that the value of the entire 120 acre holding, including the existing 9,800 square foot villa and associated buildings (RT (1979) at 68-71), as regulated was $1,380,000 in 1977. RT (1979) at 764-766.

was approved by operation of state law.[4/] CR 153. The City opposed this motion. CR 155. The successful motion to reopen is the sole reason the 1979 inverse condemnation trial did not proceed to judgment on the federal constitutional issues in the District Court. After the motion to reopen was filed it took the District

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4/ Petitioners asserted their subdivision had been approved by operation of law on January 1, 1979, a date three months before the first day of trial. CR 179 at 4, para. 97. Plainly this "deemed approved" claim could and should have been raised at trial. Petitioners' own theory virtually ignored the existence of the City's November 22, 1978 "Determination of Incompleteness of Application" which played such a central role in the alternative "deemed approved" theory devised, sua sponte, by the District Court.

Court three more years to decide the complex state law question presented, including two further days of testimony in 1981. Petitioners did not oppose entry of a final judgment on only the state law question pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[5/] Petition, App. D.

Petitioners have only themselves to blame for the five year "delay" of resolution of the federal issues that their fruitless pursuit of the state issue has caused. Should they choose

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5/ Please see CR 185 wherein, in 1982 before the District Court issued its memorandum decision, petitioners advocated a "separate trial for loss of use damages" to be held after the subdivision project was completed.

now to pursue this theory, which Judge Reinhardt found to be "clearly erroneous," in state court they cannot reasonably complain that such a litigation strategy will occasion a further "delay" of resolution of the federal claims. Petitioners' highly unusual offer to "forego" further litigation of their state claim (Petition at 6) should properly be presented to the District Court upon remand from the decision of the Court of Appeals, and should not be presented in a petition to this Court.

CONCLUSION

For the foregoing reasons respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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